



NEGOTIATING MANDATE

TO: The Chairperson of the Select Committee on trade and industry, Economic Development, Small Business Development, Tourism, Employment and Labour

Hon. MI Rayi

NAME OF BILL: Copyright Amendment Bill

NUMBER OF BILL: [B13D-2017]

DATE OF DELIBERATION: 11 May 2023

VOTE OF THE LEGISLATURE: The Gauteng Provincial Legislature is supporting the Copyright Amendment Bill subject to the amendments below being considered:

- Section 1
- Ensure that the definition of “*accessible format copy*” is aligned to that provided for in the 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.
- The definition of “*performer*” should exclude “extras”, in line with the Beijing Audiovisual Performances Treaty and international standard practice.
- Retain current definition of “*broadcast*” in Copyright Act, 1978 and delete clause 1(d). The current definition of “broadcast” in the Copyright Act is as follows: “broadcast,” when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs, or signals which - (a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;”).

- Retain the Court’s definition of *accessible format copy* for coherence with Blind SA CC and conformity with the Marrakesh VIP Treaty.
- 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;
- Adopt the court-crafted definition of ‘*permitted entity*’ by simply introducing the underlined words at the start of CAB s 1(c)(b) to read as follows: (b) an entity, including a government institution or non-profit organisation.
- Add definition of "Commission" Define the term "*Commission*" as meaning "the Commission established in terms of section 185 of the Companies Act".
- The lack of definition of the terms “*wire*” and “*wireless*” could lead to confusion and interpretation issues. In addition, while internet access is referred to in the Memorandum on the Objects of the Copyright Amendment Bill, it is not specifically referred to in the relevant sections, which could result in interpretational issues for the creative industries and the users of copyrighted works which is especially concerning given their financial obligations.
- 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:7

“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.
- “*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.
- The definitions of “*technological protection measure*” and “*technological protection measure circumvention device and service*” are not compatible with Article 18 of the WPPT, and the exceptions in section 28P relating to prohibited conduct in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test.
- Section 1 [...] (k) by the insertion after the definition of “sound recording” of the following definitions: ‘*technologically protected work*’ means a work that is protected by a technological protected measure; ‘*technological protection measure*’

(a) means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation is designed to prevent or restrict infringement of copyright in a work; technological measure circumvention device or service' means devices, products or components or the provision of services which:
(a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

Section 2

- Insert a sub-section in S2A, the clause that deals with what can be copyright, that states: 2A (3) (a) Copyright extends only to the products of a natural person's skill, effort and creativity.
- Section 6

Amend s6A to read as follows:

"Share in royalties regarding literary or musical works"

(1) For the purposes of this section, 'royalty' means the gross profit made on the exploitation of a literary work or musical work by a copyright owner or a person who has been authorized by the author to do any of the acts contemplated in section 6.

(2) Notwithstanding—

(a) the assignment of copyright in a literary or musical work; or

(b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6, the author shall, subject to any agreement to the contrary, be entitled to receive equitable remuneration or a fair share of the royalty received for the authorisation of any of the acts contemplated in section 6.

(3) (a) The author's equitable remuneration or share of the royalty contemplated in subsection

(2) shall be determined by a written agreement between the author and the copyright owner, or between the author and the person contemplated in subsection

(2)(b), or between their respective collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4).

(4) Where the author and copyright owner, is authorising rights in terms of section 6 but no agreement has been reached or the person contemplated in subsection (2)(b), cannot agree on the author's equitable remuneration or share of the royalty, then the author or the copyright owner or either party may refer the matter to the Tribunal for an order determining the author's equitable remuneration or share of the royalty.

In determining the equitable remuneration or share of royalty, the Tribunal shall be guided by –

(a) the nature of the work;

(b) the nature and extent of the author's contribution to the work;

(c) the author's experience, expertise, and qualifications;

(d) the terms and conditions of the agreement concluded by the parties, if any;

(e) whether the work was made in pursuance of a commission by any person for money or money's worth;

(f) the nature, extent and amount of consideration received by the author in money or money's worth for the creation of the work, including skills and training, enterprise development and other benefits;

(g) the nature of the market for the work;

(h) the commercial success of the work, including the demand and need for the work and its potential for future commercialisation;

(i) the copyright owner's role in creation, funding, marketing, and promoting the work;

(j) general business and economic conditions and/or prevailing market conditions in the relevant sector;

(k) the need to incentivise the creation of works, promote investment and stimulate employment in the creative industries; and

(l) other relevant considerations. (

5) The agreement contemplated in subsection (3)(a) must include the following:

(a) The rights and obligations of the author and the copyright owner or the person authorized by the author to use the work as contemplated in subsection

(2)(b); (b) the author's equitable remuneration or share of the royalty agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid to the author by the copyright owner, or the person authorized to use the work as contemplated in subsection (2)(b), to the author; and (d) a dispute resolution mechanism.

- Section 6A, 7A

Royalties and Fair Remuneration:

That at the proposed Sections 6A, 7A be amended to cater for contractual freedom through the introduction of the below phrase where relevant: "In the absence of an agreement to the contrary..." With the appropriate amendments to CAB, authors and creators would be in a position to negotiate alternative terms to the restrictive terms

- Section 8

Delete s8A, as the Performers Protection Bill is the appropriate statutory instrument to deal with performers rights and the inclusion of performers protection provisions in the Copyright Act gives rise to duplication, inconsistency and confusion.

- Alternatively, if s8A is retained in the Copyright Bill, amend it to:

- (i) Provide contractual freedom between performers and copyright owners which allow for different market practices (remuneration agreed upon may take the form of a lump sum payment (one-time payment) or receiving royalties or both, taking into account the specificities of the sector, contribution of the performer to the work as whole and to its commercial success);
 - (ii) Clarify that the remuneration agreed on shall be determined between the performer and the copyright owner or their representatives when they are voluntarily and expressly mandated by the relevant copyright owner and / or performer;
 - (iii) Remove reference to "collecting societies" in subsection 2;
 - (iv) Delete subsection 3 which empowers the Tribunal to set the royalty rate; and
- Delete subsections 5 and 6 which propose mandatory requirements to register agreements and imposes criminal sanctions (fines / imprisonment or both) for failure to register said agreements

Recommended Amendments

Specific exceptions from copyright protection applicable to all works

12B. (1) Copyright in a work shall not be infringed by any of the following acts: [...] (h) the making of a personal copy of a work acquired lawfully by a natural person for their personal use. : Provided that such use shall be compatible with fair practice.

(2) For the purposes of subsection (1)(h), permitted personal uses are—

(a) the making of a back-up copy; and

(b) time or format-shifting.;

(c) For the purposes of section 12B(1)(h), a “copy” that is acquired lawfully-

(a) includes a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift (other than a download of a kind mentioned in paragraph

and (b) does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy.

Section 8A of the CAB relating to shares in royalties regarding audiovisual work.

Supports the increased protection of performers. However, the provisions allowing a performer to a share in royalties / equitable remuneration are already provided for in the PPAB. In our view, it is more appropriate that these provisions are located in the performers’ legislation rather than in copyright legislation. It is certainly not ideal for the provisions to be duplicated across both pieces of legislation as this will undoubtedly cause confusion.

- Section 8A.6

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. There are more reasonable approaches to encouraging transparency which recognize the substantial amount of information already publicly available, and can be calibrated to avoid unreasonable burdens on producers and distributors.

- Section 12 A: 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.

- Alternatively Section 12A of the Copyright Amendment Bill, which introduces an open-ended US-style fair use provision, be deleted.
- submit that ss 12A-D and 19C are crucial to realise the right to education and freedom of expression for all members of society.
- In addition, s 19C is key to ensuring that our cultural heritage is adequately protected by providing for the digitalisation of the collections of libraries, archives, museums and galleries.
- The Constitutional Court, in *Blind SA CC*, recognised the importance of access to educational materials for learners with disabilities as well as the fact that several learners with disabilities also live in poverty and are therefore doubly excluded from the market.
- Section 12B(1)(b) – reproduction of sound recordings by a broadcaster

Specific exceptions from copyright protection applicable to all works 12B. (1)
Copyright in a work shall not be infringed by any of the following acts: [...]

(b) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of 30 days immediately following the date of the making of the reproduction, and the copy shall not be used for transmission more than three times: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;

- Propose subparagraph (i) should read as follows: *“is authorized to broadcast or communicate the performer’s performance, work or sound recording to the public” (with the phrase “by telecommunication” being removed as it is not used in our law.*

- Propose New section 12C(2) – subjecting the temporary reproduction and adaptation exception to the three-step test

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 prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.”

- Section 12D - Reproduction for educational and academic activities

The entire Section 12D should apply only to the extent that there is no collective licensing scheme in place. Where copying of extracts of books and individual journal articles is permitted under license by collective management organisations, section 12D should be inapplicable.

Section 12D (6) legitimises plagiarism by allowing incorporation of portions of printed works, a restricted act in terms of copyright law, and also a further prejudice to the copyright owner. The section should be deleted.

The entire Section 12D should apply only to the extent that there is no licensing scheme in place. Where copying of extracts of books is permitted under license by collective management organisations, section 12D should be inapplicable.

Section 19

- 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).

Amended clause The amended clause would read as follows: s 19D(1) “Any person who serves persons with disabilities, including an authorised entity.

- Suggest replacing the constrictive “royalty” obligation with a standard that preserves contractual freedom of the parties to determine what is feasible and favourable.

- In addition to making changes to the definition as suggested in the previous section, we suggest the deletion of the phrase that is struck out below, entailing that s 19D(1) read as follows: 'Any person who serves persons with disabilities, including an authorised entity [...]'.
- This section so it can be amended appropriately by limiting the provisions of section 19D(1) to authorized entities.

- Section 19D(2)(a)

Suggest the deletion of the phrase that is struck out below, entailing that s 19D(2)(a) reads as follows: 'A person to whom the work is communicated by wire or wireless means may [...]'

- Import and export of works s 19D(3)

Suggest that the following change in s 19D(3) be made where 'subsection (1)' is replaced with 's 1(a) of the Act' that defines accessible format copy: '[...]may, without the authorization of the copyright owner export to, or import from, another country any legal copy of an accessible format copy of a work referred to in s 1(a) of the Act[...].

Section 21

- Delete clause 24(a) and revert to the current default position and wording in s21(1)(c) of the Copyright Act, 1978, which reads as follows: (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 an audiovisual work 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.
- Amend section 21(3) to read as follows: "(3) (a) Any agreement reached between the copyright owner and the author may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission. (b) Where an agreement between the copyright owner and author does not specify who the copyright owner is, ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, shall vest in the person commissioning the work, unless limited to

such rights as may be necessary for the purpose of the commission. (c) The author of a work contemplated in subsection (1)(c) may, after a period of seven years from the date of the commission, approach the Tribunal for an order— (i) where the work is not used by the copyright owner for the purpose of executing any of the acts contemplated in sections 7, 8 or 9, as may be applicable and the copyright owner has, upon request, refused to license the author to use that work to execute any such acts, licensing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the copyright owner; or (ii) where the work is used for the purposes of an act contemplated in sections 7, 8 or 9, as may be applicable, in respect of which the author is the owner of the rights, ordering the copyright owner to make payment of equitable. Remuneration or royalties to the author for such other use. (d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following: (i) The nature of the work; (ii) the reason why, and period for which, the copyright owner did not use the work; (iii) the public interest in the exploitation of the work; (iv) the purpose for which the work was commissioned; and (v) the consideration received by the author for the commissioned work. (e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work. (f) Any order granted by the Tribunal in terms of subsection (3)(c) shall not be in conflict with a normal exploitation of the work or be unreasonably prejudicial to the legitimate interests of the owner of the copyright."

- Section 22A is totally impractical. It should be rewritten to allow the use of orphan works, for at least educational, research, and non-commercial purposes relating to orphan works needs to be revised. The process is impractical and costly, and few if any rightsholders who have in fact abandoned their works, are likely to know to claim from the proposed fund.

That the use of orphan works that are anonymous, under pseudonyms or where right holders are untraceable, should be permitted in Section 22A, under fair practice, and/or addressed under fair use in Section 12A.

- Section 22C It is suggested that the clause simply read that remittance of royalties is subject to a reasonable and valid agreement between the foreign CMO and the local one.
- Section 22F
- Rewording subsection 5 as follows

Following the suspension or the cancellation of the accreditation of any Collective Management Organisation, the Commission shall as soon as reasonably practicable, convene an emergency meeting of the members during

which members shall elect a suitable person to be responsible for the administration and discharging of the functions of that Collective Management Organisation. The person so elected shall be skilled in one or more of the following (a) Collective management and general administration of rights under this Act; (b) business rescue, administration, or liquidation; or (c) other skills deemed appropriate by the Commission and Tribunal.”

- General Exception (Libraries, Archives and Museums) and Private Copy

The Bill introduces many provisions relating to exceptions and limitations to the copyright owner's exclusive rights. In order to balance this situation, there is a strong persuasion for South Africa to follow the example of other jurisdictions (including the likes of Botswana, Alegria, France etc.), by introducing a system of private copy levies, to compensate rights-holders for the loss of income as a result of the wide exceptions and limitations that the Bill introduces., such a system would be good for rights holders as it would provide them with an important alternative source of income This is only a fair way to ensure that rights-holders are not detrimentally affected by the changes proposed in the Bill.

- Reversion Clause: There should also be a clear indication that the reversion does not apply to “beneficiary assignment” given to a regulated CMO.

- Section 22

Delete the proviso to section 22(3) so that it reads as follows: (3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright in such work shall have effect unless it is in writing and signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub licensor, as stipulated in Schedule 2.

- Propose that Section 22(3)91 be rejected, or as an alternative, that the sections be reconsidered with proper research being conducted on the possibility of balancing of rights.

- Sections 23(b)

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.

Section 24

- Insert the following as a new s24(1D) under the heading "Action by owner of copyright for infringement": "(1D) Without derogating from the generality of subsection (1), the High Court may, upon application by a copyright owner who

has reasonable grounds to believe that their copyright is or may be infringed by a person situated in or outside the Republic of South Africa, grant an order which it deems appropriate including the following relief– (a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose; (b) a person hosting or making available an online location, service or facility situated in or outside the Republic of South Africa which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; and/or (c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside the Republic of South Africa that is used to infringe copyright as replaced, amended or moved from time to time." Insert the following associated definitions in s1: "'Internet Service Provider' means any person providing information system services." "'Information System Services' includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service".

- Sections 27(5B) and 28(O)

Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures.³⁸ This requires that ss 27(5B) and 28(O) be amended.

Delete ss 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 (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;³⁹ is deemed to have infringed copyright in the work which infringement is actionable under s 24.”

Section 27(5B) seeks to impose criminal liability for engaging in uses that Parliament expressly authorises subject to certain exceptions.

- Extend the ambit of the clause to every lawful use but retain the reference to exceptions to ensure clarity. Amended clause 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 [...]”.

- Insert the following as a new section27(4A):

(4A) Any person who- (a) distributes, sells, offers to sell, makes, causes to be made, or has in his or her possession, any machine, equipment or contrivance; or (b) creates, causes to be created, distributes, sells, offers to sell or has in his possession any software, shall be guilty of an offence. Insert the following as a new s27(4B): (4B) Any person who, without the consent of the owner, distributes in public for commercial purposes, by way of rental, lease, hire, loan or similar arrangement or who makes available for download from, or viewing from, a which copyright subsists shall be guilty of an offence. Insert the following as a new s27(4C): (4C) Any person who, without the authority of the owner of the copyright- (a) distributes an infringing work for any purpose to such an extent that the owner of the copyright in that work is prejudicially affected, or (b) stores more than five different infringing works on an electronic storage device; shall be guilty of an offence.

- Propose a new subsection (5A) of section 27

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. As Slomowitz AJ observed in the Video Parktown North case, the essence of copyright as a right of ownership is that the copyright owner has an exclusive right “to do what he pleases” with the subject-matter of the copyright.

Submit that this provision be rejected and that the phrase “and for commercial purposes” must be removed.

- Section 28P (1)

The wording of s 28P (1) is too narrow to achieve its objective. We 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.

- Submit that it is enough to retain s 28P (1) that exempts the utilisation of circumvention for the purposes of exceptions and limitations that are in the Act. With this recommendation, read with the in-built conditions in s 19D, our rights will continue to be realised without negatively affecting copyright owners.

- Section 28P (2) should be deleted in view of the Blind SA ConCourt ruling. ▪ Once the CAB is signed, it will enable various legislative updates in the Dept. of Sports, Arts and Culture, the National Digitisation Policy, and Open Data & Cloud Policy to proceed. To date the Copyright Act has stymied their progress.
 - Authors and creators will benefit from the above exceptions too. The Bill also gives them more control over their works, reversion of rights (can be renegotiated), better moral rights and contractual protection. Conflicts with the Constitutional Court ruling of 21 September 2022 relating to people with disabilities and should be deleted from the Bill to prevent the perpetuation of the unfair discrimination.

- Section 28 Q

Delete s28Q.

Section 28 U

Insert the following as a new s28U under the heading "Automated takedown by Internet Service Providers" "An Internet Service Provider shall implement automated takedown forms that allow verified owners of copyright works the ability to remove infringing live streaming data immediately.

- Section 29H(C)

Delete s29H(c).

- Clause 35(b) Section 39 (C g)

Delete proposed sub-section (cG). Insert a new s29A(2)(g) that reads as follows: "(2) The Tribunal may - ... (g) set aside or vary a copyright assignment or copyright licence agreement, or a term of such an agreement, if that agreement or term is unfair, unreasonable, or unjust. A term will be unreasonable, unfair and/or unjust if- (i) it is excessively one-sided in favour of

any person, including the author of the work which is the subject of the agreement; (ii) the terms of the agreement are so adverse to one party (including the author) as to be inequitable; or (iii) the agreement was subject to a term or condition, the fact, nature, and effect of which was not drawn to the attention of the party prejudiced thereby in a clear and satisfactory manner prior to entering into the agreement."

- Clause 35(b) Section 39(c) Delete proposed sub-section (cl). Insert a new s29A(2)(g) as set out in the row above.
- Clause 35 (c) Section Amend s39(3) to read as follows: "(3) Before making any regulations in terms of subsection (1) or (2), the Minister must publish the proposed regulations for public comment for a period of not less than 60 days.
- Section 39(c) 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.

Recommend the conduct of a full economic impact assessment, as well as an objective expert study of alternative legislative approaches with reference to other jurisdictions.

- Sections 39(cG), (cl), (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.
- Section 39B
Delete proposed s39B and replace it with a new s29A(2)(h) which reads as follows: "29A(2) The Tribunal may - ... (h) declare unenforceable a term of a contract which unfairly prevents or restricts the doing of any act which by virtue of this Act would not infringe copyright or which serves to renounce a right or protection afforded by this Act in circumstances where the party that enjoys the protection has not been adequately compensated for the benefit to the other contracting party of that renunciation."
- This section is overly broad and should either be removed in its entirety or reframed for clarity and to ensure that there are no negative consequences for creators in the value chain.
- Clause 40

Amend clause 40 as follows: "Short title and commencement 40. (1) This Act is called the Copyright Amendment Act, 2023, and comes into operation on a date fixed by the President by proclamation in the Gazette, which date shall be not less than 24 months after the date on which the President assented to the Act."

General Recommendations

- Keeping clauses that ensure that future earnings on past contracts are shared with musicians and performers in the form of fair royalties, ensure that future contracts guarantee fair royalties for musicians and performers.
- Propose economic impact and legal assessment be conducted to assess for the first time the impact of the amendments on the various copyright sectors.
- The Bill should afford parties the contractual freedom to determine their affairs as they see fit, all whilst ensuring that there is some measure of protection for the most vulnerable. This can be achieved by codifying the “boni mores” standard without necessarily dictating how the commercials of every contractual relationship. Instead of dictating commercial terms, the Bill should rather seek that every contractual relationship entered into by authors and copyright owners should be “objectively reasonable.
- Statutory Damages: In terms of the current legislation, authors and copyrights owners are afforded three remedies namely, interdict, delivery-up and damages³. Digital exploitation of music has spotlighted the shortcomings of each of these remedies thus necessitating additional remedies to be prospected. This can be achieved by bolstering these criminal sanctions with statutory damages. Further, it would serve to discourage professional pirates who would now feel the financial pinch each time they are found to have been infringing copyright. The Bill must clearly state the application of the test to each and every encroachment or exception to the exclusive rights afforded to rightsholders.
- It would be more prudent to first evaluate the impact of the Bills and amend certain provisions with a view to secure the attractiveness of the South African market globally and ensure compliance with international copyright law.
- To strive towards the creation of a legal framework that protects the investments of rightsholders and is conducive to the film and audiovisual content production industries.
- The NAB further submits at the outset that given the importance of the protections granted to performers in the PPAB, any matters pertaining to performers and the rights of performers should be removed from the CAB. The duplication of performer protections in both the CAB and the PPAB may lead to

problems with the interpretation of the legislation and could result in difficulties in implementation.

A handwritten signature in dark ink, consisting of several overlapping loops and lines, positioned above a solid horizontal line.

Date: 17 May 2023

HON. WILLIAM MATSHEKE

CHAIRPERSON: ECONOMIC DEVELOPMENT PORTFOLIO COMMITTEE

GAUTENG PROVINCIAL LEGISLATURE