The Chair of the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour
The Hon. M. Rayi MP
National Council of Provinces
Parliament of the Republic of South Africa
Cape Town

VIA email to the Select Committee Secretariat:
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Dear Honourable Chair

JOINT SUBMISSION ON THE COPYRIGHT AMENDMENT BILL NO. B13D OF 2017 AND THE PERFORMERS' PROTECTION AMENDMENT BILL NO. B24D OF 2016 BY THE ASSOCIATION FOR COMMUNICATION AND ADVERTISING (ACA) AND THE COMMERCIAL PRODUCERS ASSOCIATION (CPA)

We thank you for the opportunity for stakeholders to submit comments on the Copyright Amendment Bill and Performers' Protection Amendment Bill.

This is a joint submission made by the Association for Communication and Advertising (ACA) and the Commercial Producers Association (CPA), with a high-level focus on key concerns for stakeholders in South Africa's advertising and television commercial production industries. We look forward to participating in this public consultation and would greatly appreciate an opportunity to make oral presentations to your Committee during the upcoming public hearings on the Bills.

1. A brief overview of our industry

1.1 The **Association for Communication & Advertising (ACA)** represents the interests of advertising agencies in South Africa, and it is the official representative body of South Africa's advertising and communications profession. The ACA is a strong advocate of self-regulation in the advertising industry and its members are governed by the Advertising Regulatory Board (ARB). The ACA currently has 61 corporate members and 12 individual (incubator) members, located in Johannesburg, Durban & Cape Town.[1]

1.2 The **Commercial Producers Association (CPA)** is the trade association for production companies that produce television commercials for both the South African and international markets. The CPA has a membership of 55 production companies which are based in Johannesburg and Cape Town.[2]

1.3 Commercial production companies are commissioned by advertising agencies to produce commercials on behalf of their clients to effectively market their products and services to consumers. These clients may be South African companies or prominent international companies that engage advertising and creative agencies in South Africa to develop and design their advertising and brand campaigns. South Africa's advertising agencies and television commercial production companies consistently rank amongst the world's leaders in creativity and media innovation. They create a broad range of opportunities for South Africa's creatives, including sustainable jobs and employment, support transformation initiatives, and contribute to broader economic growth in South

[1] Members | ACA
[2] CPASA | Members

Africa through attracting new investments into high quality creative content and audiovisual production projects.

1.4 The ACA and CPA support advertising industry self-regulation, and we have through engagements with other associations that represent the interests of performers, including models and actors who are featured in commercials, such as NAMA (the National Association of Modelling Agencies), and SAPAMA (the South African Performing Artists Managing Association), agreed on certain best practices and guidelines on performer remuneration, and standardized commercial production contracts to ensure that performers are engaged in our industry on fair and equitable terms.

Please see **ANNEXURE "A"** for examples of agreement templates that are used by the CPA and the ACA for their members when engaging performers.

Standardized contracts and agreed best practices around remuneration are also important due to the nature of our industry, which requires swift and transparent engagement with clients on production budget allocations and rights clearances, which processes typically need to be completed within much tighter timeframes than in most other creative content production industries.

1.5 Internationally, the advertising and other audiovisual content production industries have become intensely competitive, due to the recognized value it holds for driving foreign direct investment, job creation and broader economic growth in countries with thriving creative content production sectors. As a result of the globalized nature of the industry, the production of television commercials is not limited to a single territory and there is no obligation on advertisers to produce a commercial in the territory in which broadcast is intended. The decision to produce a commercial in a certain territory comes down to a number of factors, most notably: the existence of a viable infrastructure, cost and value for money, the availability of locations, good weather and long hours of light (for shooting outdoors), travel times and time zones, and a legislative environment that is conducive to the production process.

1.6 Clients and advertisers are spoilt for choice – currently South Africa is ranked as one of the top television commercial filming and production destinations in the world, but we are encountering increasing levels of competition from many other territories that compare favorably and several emerging destinations (primarily in South America and Eastern Europe). This is mainly due to the increased recognition by the governments of many developing countries of the importance of supporting the growth of their audiovisual content production industries for the huge potential it has for attracting foreign direct investment and driving job creation and broader economic growth. Most commercials for broadcast in South Africa are currently made in SA but, should the underlying legislative environment change and become disadvantageous for productions to take place in SA, local and international advertisers could well look to other territories in which to produce their commercials and advertising campaigns. There is a term for this in the industry: 'runaway production'. The term was coined in the US after their industry lost billions of dollars in revenue to "runaway locations" like Canada, Australia, New Zealand, and South Africa which offered high production values at a lower cost and within less prohibitive legislative and regulatory environments.

2. Key Advertising Industry concerns on the Bills

2.1 We support government's initiative to update South Africa's Copyright Act and the Performers' Protection Act, which is important considering the new business opportunities and challenges presented by the digital age. When updating these laws, it is important to consider the potential economic impacts that proposed legislative changes would have on the affected industries, and to assess it for alignment with international best practices, and compliance with relevant international treaties.

2.2 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.[3] 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. Legislative proposals that were designed to address bespoke issues that may exist in one industry, for instance the music industry, are extended to find application across all copyright industries in the Bill, without any underlying rationale, explanation, or impact assessment measuring how other industries would be impacted on. An example of this is the recommendation made in the Copyright Review Commission report of 2011 for a 25-year reversion right to be considered for musicians in certain circumstances where they may have concluded unfavorable deals at the beginning of their careers, and which was erroneously construed in the Copyright Amendment Bill as an unwaivable 25-year limitation on all assignments of rights in literary and musical works (including film and television scripts, and music composed for film), regardless of the circumstances of each contract or project.

2.3 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. Television commercials may be audiovisual works, but they are produced, acquired, and used in trade in completely different ways than other audiovisual works, such as feature films, scripted television series, animation, documentary features, video games, music videos, etc.

To date in the legislative process, it is not clear whether any of the advertising industry's bespoke requirements and its production environment have been duly considered by government, as no direct responses have been forthcoming to submissions made by the CPA on behalf of the advertising industry during prior public consultation rounds.

2.4 The Bills propose the introduction of sweeping changes to how rights clearances, acquisitions, licensing, and transfers in respect of copyright works and performers' rights can be managed contractually.

2.5 The Copyright Amendment Bill proposes an **unwaivable 25-year limitation on all assignments of rights in literary and musical works**[4] 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 the film and television industries. Investments made into the production of high-quality audiovisual content are extremely high-risk, as there are no guarantees that such investments would be recouped from the future commercialization activities. Audiovisual productions typically involve the creative contributions and performances of a broad range of persons. If a producer cannot secure rights clearances and transfers from all parties who contribute creative output towards the end-product, for the life of copyright in the audiovisual work, it would severely prejudice a producer's ability to secure finance for new productions, and harm the value of the content itself, given that the commercialization of the work could only be guaranteed for

[3] The Department of Trade and Industry (DTI) did not attend to full stakeholder consultations prior to the drafting of the Bill, and it did not publish the findings of an economic impact assessment study, as required in terms of government's Socio-Economic Impact Assessment System (SEIAS) guidelines. Despite consistent calls made by industry stakeholders and several Members of Parliament during the National Assembly's Portfolio Committee on Trade and Industry's deliberations on the Bill, the DTI failed to produce its SEIAS report that it claims to have properly introduced into Parliament previously. The failure to comprehensively consult with all affected industries, and to attend to an appropriate economic impact assessment study, resulted in the drafting of many legislative proposals that fail to appreciate existing market practices and the nuances that exist in the different creative industries. A 'one-sized-fits-all' approach was adopted to a large extent. Legislative interventions intended to address a bespoke issue in one industry (e.g. music) can have disastrous economic consequences if applied indiscriminately across other creative industries (e.g., film and television production, advertising, publishing, software development, etc.).

[4] Clause 25(b) of the Copyright Amendment Bill, amending Section 22(3) of the Act, read with Section 39B of the Bill (the contract override clause that prohibits contractual derivation).

a short period of time (until rights reversions occur). 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. If a commissioning party can secure full rights (that are not subject to unwaivable limitations of time periods for assignments of rights by script writers, musicians, etc.) in creative content and television commercials produced at the same cost in another country, they would be incentivized to select that foreign destination over South Africa as the production location.

2.6 The Copyright Amendment Bill proposes to change the existing rules that govern how copyright vests in **commissioned works**, including audiovisual works[5]. 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 we submit that these proposed changes should be rejected by the NCOP.

2.7 The Copyright Amendment Bill seeks to introduce **new statutory royalty entitlements for authors of literary, musical, and visual artistic works** (which works may also be included or adapted for use in advertising campaigns and television commercials) to share in the gross profits made by copyright owners from the commercialization of underlying works.[6]

2.8 The Bill also proposes an **unwaivable statutory royalty entitlement for all performers who appear in audiovisual works**, which would include television commercials.[7] 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 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. The intention behind the contract override appears to be to protect the weaker bargaining party to a contract from transferring their rights and is based on an erroneous assumption that all contracts dealing with copyright or performers' rights tend to be exploitative.

2.9 In the advertising industry, performers already benefit from the payment of additional usage fees for the continued use of a television commercial or other marketing materials that contain the image of the model or performer concerned beyond the initially agreed period of use. Usage fees are calculated based on industry agreed best practices and remuneration guidelines and as a percentage of the initially agreed fee with the performer or model concerned. The amount payable would depend on the nature of the use that would be made (i.e., the media in which the use would be made) and the territories in which the use would be made. To illustrate, we attach an example of an industry agreed method of calculation of usage fees that is relied on in the advertising industry and marked as Annexure "B". We understand that the intention behind the introduction of a statutory royalty entitlement for performers was mainly motivated for by the South African Guild of Actors

[5] Clause 24 of the Copyright Amendment Bill, amending Section 21 of the Act.
[6] Sections 6A – 7A of the Copyright Amendment Bill (proposed in Clauses 5 and 7 of the Bill, respectively).
[7] Section 8A of the Copyright Amendment Bill (proposed in Clause 9 of the Bill), read with the contract override provision proposed in Section 39B (Clause 36 of the Bill).

(SAGA) due to a problem they identified with respect to the payment of 'repeat fees' by local broadcasters, such as the SABC, for the repeat broadcasting of television series featuring local actors. **We submit that 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.** Section 8A risks the introduction of conflicts with the remuneration and usage fee benchmarks that already exist in the advertising sector, and which was negotiated in good faith over the course of many years to the satisfaction of all parties concerned, including advertising agencies, producers, performers, and models.

2.10 A great deal of uncertainty exists as to who would be expected to pay the new statutory royalties to all performers featured in audiovisual works, and how these royalty rates would be objectively determinable. Section 8A simply states that all performers shall have the right to share in the royalty received by the copyright owners of audiovisual works for any exploitation of their exclusive rights of copyright. Section 8A was closely modelled on Section 9A of the Act, which deals with Needletime-royalty entitlements for (music) performers featured in sound recordings. We are not aware of a similar 'Needletime-styled' statutory royalty regime that exists for the purported benefit of performers featured in audiovisual works anywhere else in the world and question the basis and suitability of this proposal for our industry.

2.11 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. As mentioned above, 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. It is based on these well-established advertising industry benchmarks that advertising agencies and commercial production companies can be engaged with confidence and clarity by local and international clients on short notice. Advance clarity on the costs and additional usage fees that may become payable over time is critical for budget determinations in respect of advertising campaigns and television commercial productions. Ministerial interventions that may follow in the advertising industry based on Section 39B would result in major disruptions of our established industry benchmarks and practices.

2.12 Television commercials are not assets that can generate profits in the same way as other audiovisual works, and are not made available for sale or broadcasting as may be the case with feature films, scripted television drama series, video games, etc. The use made of a television commercial by the owner thereof is to market their products and services to consumers. There is no guarantee that consumers would, because of viewing a commercial, make direct purchasing decisions that would be give rise to profits that can be attributable and determinable to arise from the flighting of a television ad. 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**.

2.13 To compound the potential negative impacts of 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

[8] Section 8A(6) of the Copyright Amendment Bill.

therein. The Minister must prescribe the format and manner in which registration and reporting on commercial uses should occur. Failure to report accurately and timeously can subject copyright owners and their licensed users of content to criminal sanction and completely disproportionate penalties such as imprisonment or a fine of a minimum of 10% of a company's annual turn-over. We understand that the criminalization of non-reporting was a recommendation made in the 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 we 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. It would also not be practically feasible for advertising agencies and commercial producers to track and report on all commercial uses made of audiovisual content created on commissioning by their clients. The criminalization of non-reporting on all uses made by copyright owners or their licensees, and the prescription of disproportionate penalties and criminal sanctions for non-compliance would unnecessarily heighten the risk and reduce investor appetite for doing business in South Africa's advertising and other audiovisual industries.

2.14 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.[9] These sections were not drafted or conceptualized by the Department of Trade and Industry from where the Bill originated, and were instead written into 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.

2.15 The enactment of these provisions may well have tremendous negative economic impacts on our sector, as well as constitutional implications. **We submit that the NCOP should reject Sections 6A – 8A of the Copyright Amendment Bill.** If the provisions are to be proceeded with, we submit that the advertising industry should be excluded from its operation, due to the reasons set out in our submission above.

3. Conclusion

3.1 In addition to the high-level comments made in this submission on the key concerns that stakeholders in the advertising industry have, the Bills suffer from many more material defects that we will not venture detailed comments on in this written submission. Additional concerns include the overly broad and invasive new regime of copyright exceptions and limitations[10], the inadequate

[9] Only some of the sub-sections were opened for public consultation, while the substantive provisions which purport to introduce the new statutory royalty entitlements were not opened for public consultation.
[10] Clauses 2, 15, 16, 21 and 22 of the Copyright Amendment Bill.

legal protections proposed for Technological Protection Measures[11] applied in relation to digital products, and the failure to introduce meaningful enforcement remedies to counter-act infringement in the online environment. Our comments in this submission are focused on the most egregious provisions in the Copyright Amendment Bill that could cause great harm to the growth and viability for new investments to be made into high-quality content production projections in South Africa's advertising industry.

3.2 It is our submission that the new statutory royalty provisions proposed under Sections 6A – 8A of the Copyright Amendment Bill, the contract override provision in Section 39B, and the overly broad executive powers granted to the Minister under Section 39 to effectively legislate how advertising industry contracts should look like, and to unilaterally determine the royalty tariffs and usage fees that would find application in our industry, will have the combined effect of reducing the attractiveness of doing business in South Africa's advertising sector for both local and international clients. It completely ignores the well-established and regulated advertising industry practices, remuneration benchmarks and standardized production contracts that have already been agreed on as being fair and equitable by associations representing performers on the one hand, and associations representing advertising agencies and producers of commercials on the other.

3.3 The Bills suffer from so many material defects that could harm the viability and growth of our industry, and other creative content production industries in South Africa, that the NCOP should reject the Bills to allow for a comprehensive re-drafting of the Bills to be attended to. The swift completion of the critical work required to ensure that the Bills are fit for purpose and would support the growth and viability of South Africa's creative industries, should be achievable within a relatively short period, but that would require the involvement of recognized industry experts and lawyers who are experienced in practicing copyright law.

3.4 We would like to take up the opportunity to present to your Committee during the upcoming public hearings on the Bills, and to engage further on these issues at that time.

Yours sincerely,

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[11] New Sections 27(5)B, 28O, 28P, 28R, and 28S and the new definitions of "technological protection measure" and "technological protection measure circumvention device".