



To: The Standing Committee on Finance, Economic Opportunities and Tourism
Western Cape Provincial Government

c/o: Ms Zaheedah Adams (Procedural Officer)
zadams@WCPP.GOV.ZA

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 Independent Producers Organisation (IPO), Independent Black Filmmakers Collective (IBFC) and Animation S.A. (ASA).

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

This is a joint submission made by the Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA). We are the leading organisations representing the majority of South Africa's film, television, and animation producers – persons who generate work for the entire industry value chain and its suppliers and downstream beneficiaries.

1. Who we are:

- 1.1 The **Independent Producers Organisation (IPO)** is a representative, national organization of independent South African film, television and digital producers constituted to represent, protect, and promote the interests and needs of producers and, in turn, all who work in and are suppliers to the industry, to ensure an empowered, transformed, vibrant and flourishing industry which maximizes its economic contribution and job-creation potential. The majority of the IPO's individual members are Black and the majority of its company members are Level 1 or 2 BEE Compliant¹
- 1.2 The ²**Independent Black Filmmakers Collective (IBFC)** is a membership-based, non-profit entity supporting collaborative business-to-business networking, advocacy and empowerment of black filmmakers and content producers. The IBFC's membership is comprised of wholly black-owned South African film and television production companies, independent filmmakers and content creators, and producers, marketers, exhibitors, distributors, media and entertainment facility owners, and entrepreneurs.
- 1.3 **Animation S.A. (ASA)**³ is a non-profit industry association representing the interests of South Africa's animation and visual effects (VFX) industry and its professionals

¹ [Welcome to the IPO –](#)

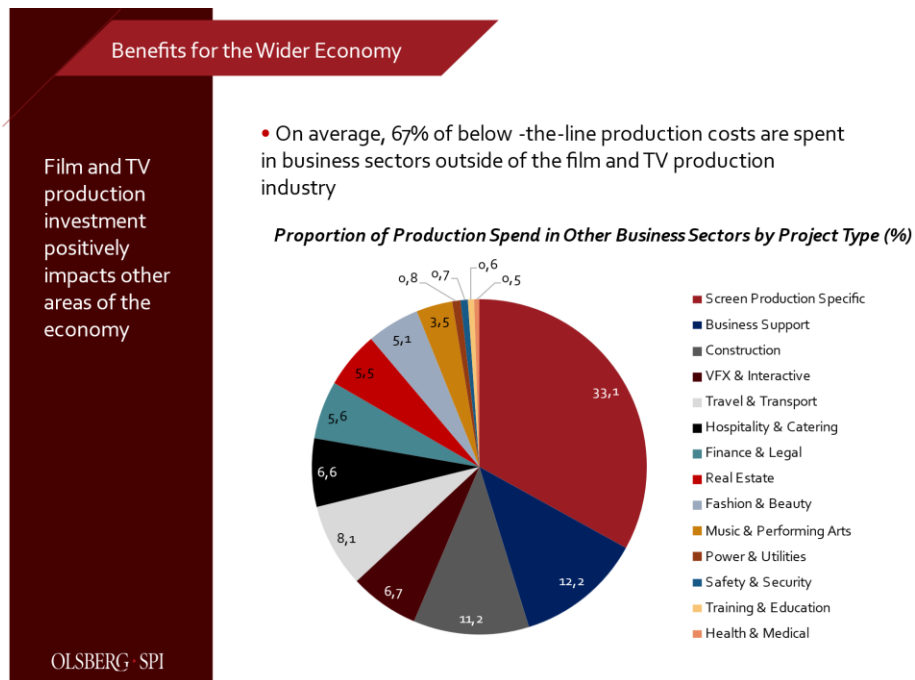
² www.ibfc.org.za

2. What we do:

Jointly, the IPO, IBFC and ASA represent some 90% of those companies and individuals responsible for ALL WORK GENERATED IN THE SOUTH AFRICAN AUDIOVISUAL SECTOR:

- creating work opportunities for writers, actors, crew – from highly skilled to unskilled new industry entrants, publicists, location scouts, stunt people, caterers, drivers, seamstresses, construction workers, artisans, editors, special effects, animators, musicians, animal handlers, distributors...
- creating income-generating opportunities for all suppliers to the industry – studios, logistics, equipment and props hiring, costumiers, transport, hospitality/accommodation, armourers, location scouts, location hire, insurance, florists, health & safety companies, restaurants ...
- attracting billions in Foreign Direct Investment

NB: 67% of below-the-line production spend flows to other sectors.



These funds are spread rapidly throughout the wider economy during the short shooting period of the production, as illustrated below:

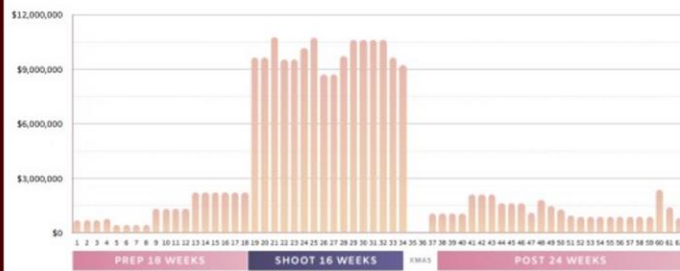
The Speed of Impact

Film and TV productions inject huge amounts of capital very rapidly

OLSBERG SPI

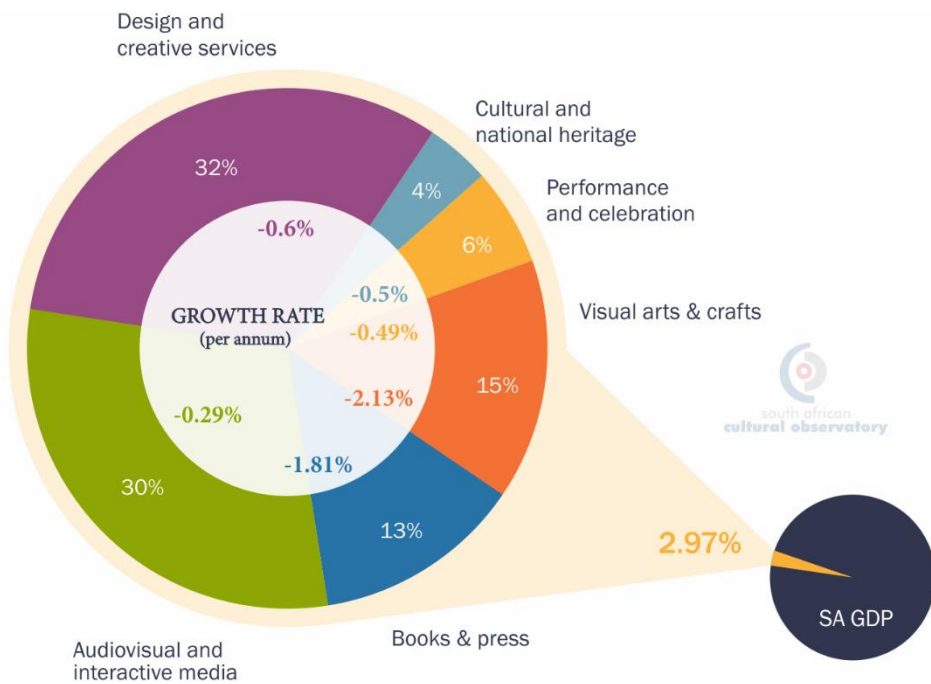
- Analysis of several actual film and television budgets show how quickly the economic impact of film and TV production is delivered
- For example, a major \$220 million budget film shows that an average of \$10 million per week was spent during the 16 -week shoot.

Major Film Weekly Cashflow (\$220 Million Budget)



3. The South African Creative Industries and contribution from the AV sector:

A recent South African Cultural Observatory Mapping Study (2022) showed that the Cultural and Creative Industries in South Africa contributed nearly 3% of the value of GDP in 2020 and employed nearly a million people (6% of all jobs), despite being very negatively affected by the COVID-19 pandemic. The Audio-Visual and Interactive Media domain (which includes film, television, podcasting, animation and gaming) made up 30% of the sector’s GDP contribution



a. AV Sector economic Overview

- pre-Covid, valued at R8-10 billion - over R3.4 billion was Foreign Direct Investment
- grew @ 5.2% year-on-year – higher than national average
- +- 60 000 full time, FTE & freelance jobs (120 000 when including induced jobs)
- jobs range from highly-skilled, world-class cast & crew to artisans and unskilled new entrants to the workplace who can go on to build successful careers in the industry
- 65% of the workforce under the age of 35 > contributes to NDP 2030 goals
- 85% of the industry workforce is Black
- employment multiplier (2019/20) 5.65 (SA All Industries 3.10)
- economic multiplier (2019/20) 2.82 (SA All Industries 1.75)
- contributes meaningfully to direct and indirect taxes throughout value chain
- premier international filmmaking destination
- local content biggest driver of advertising revenues for local broadcasters
- incalculable value of contribution to social cohesion, national identity, heritage and culture – telling our stories to compatriots and the world
- promotes 'Brand South Africa' and drives tourism

However, the 2021 NFVF Economic Impact Assessment study shows that, due to the impact of Covid and challenges with the DTIC rebate incentive scheme, the industry has:

- Shrank by 59% to R2,89 billion
- Lost jobs from 60 000 down to 12 775
- 38% of businesses have closed

(It is interesting to note from the NFVF research that over the same period, Government support for the sector shrunk from R1,289 billion down to a mere R493 million – a percentage decline which exactly mirrors the decline in Government support.)

*It is important here to note that **globally the industry is growing at +-25% per annum.***

Many countries, recognizing the economic and job creation importance of this sector, have increased the attractiveness of their policy, legislative and incentive frameworks to attract and stimulate as much production as possible, attract FDI and create jobs. Some countries, e.g. Greece (the new Hollywood of Europe), Croatia and the UK are running out of studios, equipment and key and scarce skills to service their production booms.

South Africa is losing out on its rightful share of this growth, and losing work and skills to other countries as investor confidence declines due to policy, legal and financial missteps and uncertainty.

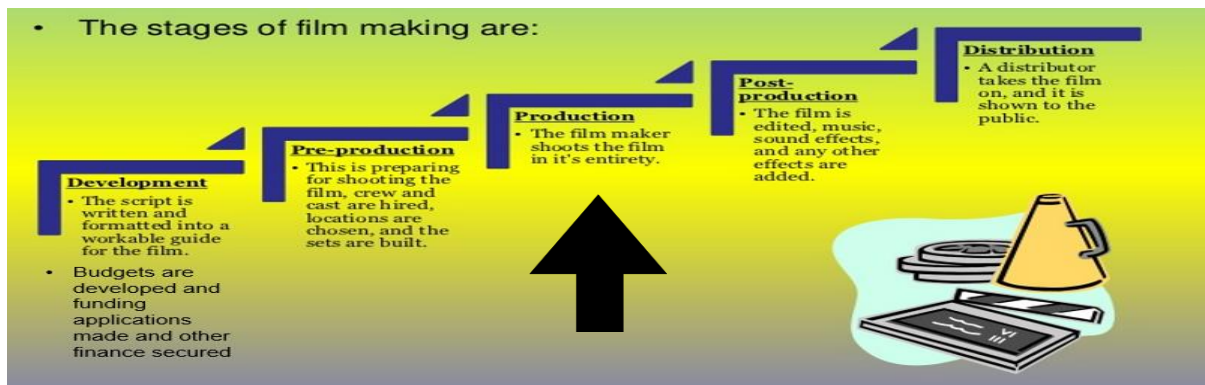
The AV Sector is a high-risk industry and local and international investment in the industry is flying to other countries as South Africa's risk profile due to the above is rendering investment in the industry unpalatable.

Any legislative provisions that threaten foreign and local investment in the sector will undermine not only the industry's economic contribution, transformation and development of small, often Black-owned, businesses, but the country at large, and must be avoided at all costs.

4. About the South African AV Sector – how we work

- Most production companies are small businesses, almost all Level 1 or 2 BEE Compliant
- Production budgets are secured through combination of grants, rebate incentives and private or institutional investment or loans, sometimes advances from distributors

- Some productions eg SABC or Streamers are 100% commissions, some co-productions, some international productions shot in SA
- Some scripts are producers' concepts developed by writer, some are scriptwriters' pitched to producers
- **+9/10 productions don't make a profit.** Any profits generated are used by producer to cover overheads during the development time of the next production
- Whilst production has historically centred around hubs, notably in Gauteng, the Western Cape and KZN, increasingly production activity has not only spread to rural areas in these provinces but also to other provinces such as Limpopo, Mpumalanga and the Eastern Cape which, for example, has seen a tremendous boom in production activity in the last few years and is deriving significant economic benefit therefrom.



Please note: the above process can take anywhere from 2 to over 10 years of work for the producer. *Performers and crew only work on the production during the middle, short Production phase - sometimes working just a few days or weeks on the production.* Please consider this particularly in respect of the Royalties proposals contained in the Bills.

- a. Film and television producers are responsible for all aspects of ensuring that a film or television production is realized, financed, developed, and completed on-time and on-budget. Once finance has been secured, film production typically involves five key phases, namely the **development phase** (which involves engagement of scriptwriters, story development, and financial planning), the **pre-production phase** (which includes the finalization of the script, cost and budget determinations, location scouting; hiring of actors, directors, cinematographers, technical and camera crews, costume design, and the equipment needed to facilitate the production); the **production phase** (when principal photography takes place and filming commences, and the hiring of additional crew, including script supervisors, property masters, picture and sound editors, camera operators and grips, and production coordinators to supervise supplemental departments such as catering, refuse removal, set construction, etc.); **post-production** (which involves editing and combining of audio and visual materials, and sound and visual effects to create the end-product); and **distribution** (when the end-product is marketed, promoted and distributed for public viewing whether through cinematic release, digital media platforms, DVD distribution, etc.).
- b. The production of high-quality audiovisual works in the film, animation and television industries are **extremely high-financial risk projects**. There are no guarantees that money invested in the production and distribution processes would ever yield net-profits. In fact, many films do not make it past the pre-production phase, and from those that are completed, only a small percentage will turn a profit. Producers leverage their financial losses off the few projects that

do make money, to sustain their companies during the long development phases for their next productions. Most production companies in South Africa are small businesses, and local blockbuster releases are few and far between. Securing finance for new productions is highly challenging, and due to a lack of availability of substantial funding support from government, producers are reliant on private sector investors, mainly international stakeholders, to fund their productions and co-productions with international partners. It is therefore critically important that the underlying legislative and regulatory framework attracts and incentivizes investment, to enable producers to secure the required levels of finance to develop, produce, complete, and distribute new films and TV series of high-quality. It is vital that legislation protects and rewards the investment and protects the IP of the investment in order to yield returns down the line in the extended distribution of a project/s

- c. **South Africa’s film and television industries have the unique potential to become a key driver of job creation, transformation and economic activity, growth, and recovery in South Africa.** The industry, in which 65% of the workforce is under the age of 35, and of that 85% being of the black PDI population can also make a significant contribution to addressing youth unemployment towards the achievement of the NDP 2030 Goals. Studies² have shown how investments made into feature film and scripted drama television series inject large amounts of capital swiftly into the local economy where a production is located. An estimated 67% of production spend is allocated outside of the production sector, and feeds into so-called ‘satellite economies’ that support the facilitation of film productions. This includes hospitality, travel, tourism, construction, catering, and other industries including micro-enterprises. Film productions create a broad range of jobs, ranging from unskilled (persons can ‘learn on the job’ without needing a matric, university degree or formal training) to highly skilled. Due to its recognized potential to drive economic activity and attract direct foreign investment, and the global surge in consumer demand for high-quality entertainment content, the global film and television production industry, one of the fastest growing sectors in the world at around 25% per annum, has become intensely competitive. Countries are fiercely competing with each other to attract larger shares of available global production spend.
- d. South Africa has everything it takes to become one of the **preferred global destinations for the production of high-quality audiovisual and local and international film and television productions.** Our country is blessed to have so many excellent shooting locations across different landscapes, good weather and long hours of sunlight, excellent cast and crews, directors, cinematographers, and animation and special effects technicians. Recent big-budget international feature films shot on location in South Africa include “*Mission: Impossible 8*”, “*The Woman King*” and “*Beast*”. We also have rich and vibrant cultures, cultural heritages, and stories are yet to reach global audiences in the way that it should, i.e., told by South Africans, produced by South Africans. The empowerment of local producers to be able to finance new productions, and to control and manage the underlying Intellectual Property rights in their projects, is a key fundamental requirement for our local industry to flourish. International investment into local productions and co-productions is another essential component. It is not only about money, but also about collaborations to ensure that the end-product is one of sufficient high-quality, that it can be distributed worldwide and find global appeal. A recent example of a highly successful collaboration that saw a South African filmmaker’s vision and

²⁴ [The Impact of Film and Television Production on Economic Recovery from COVID-19 — Olsberg SPI \(olsbergspi.com\)](https://www.olsbergspi.com/)

incredible journey reach global audiences (and an Oscar win!) is the internationally celebrated documentary feature, *“My Octopus Teacher”*, which involved an international partner in Netflix. South Africa’s film sector has already illustrated, time and time again, that it can deliver on the big stage, but now more than ever before, it is necessary to ensure that our legislative environment is conducive to attracting investment, otherwise massive opportunities will be lost also indirectly affecting future tourism numbers, therefore diminishing future induced economic impacts.

- e. **South Africa’s film and television industries, despite its incredible potential to become a key driver of economic recovery and growth in the post-pandemic era, stands at a precipice. If legislative interventions are made that would further impact negatively on producers’ ability to attract and secure finance for new productions, the massive opportunities presented by the global surge in consumer demand for high-quality content (which, ironically, was fuelled by the pandemic) would be lost. The recovery of our industry from the crippling impact of the pandemic and its ability to grow in line with the global industry and deliver its many potential benefits to the country, would also not be feasible in such an environment.**

5. AV Sector response to the Bills

- a. We fully support government’s initiative to reform our existing copyright and performers’ rights laws to bring it in line with the developments of the digital era and in line with international treaties, with the noble intention of the Bills to underpin a thriving sector. However, we assure you that these Bills will have the exact opposite effect if passed as is. They are fundamentally and procedurally flawed, and will:
- Drive away investment in local content
 - Stifle opportunities for international co-productions
 - See big budget international productions taken to other countries, along with the massive investments of FDI they bring and the thousands of jobs they create
 - Put a stranglehold on the industry, especially small, emerging production companies
 - Frustrate transformation efforts in the industry and the ability to build sustainable businesses
 - Make it nigh-impossible for young, emerging filmmakers to make their first productions which serve as calling cards for future work and growth
 - Ultimately, work and income-generating opportunities for *all* working in, suppliers to and downstream beneficiaries of the AV sector will shrivel
 - Will undermine the intentions of the NDP 2030 which ‘recognises that the creative sector should be supported by government ... as a sector that has great potential for growth and job creation over and above its role of facilitating dialogue for nation building’, and of the Presidential Masterplan for the sector – one of 12 key sectors identified for their economic potential – which seeks to implement plans to optimise such economic recovery, growth and job creation, towards the NDP 2030 goals
 - The country will lose the many benefits the sector offers and its potential to contribute to economic recovery, growth, investor confidence and tourism

We urge decision-makers to take the harsh and irrefutable economic realities into account in your deliberations going forward and do the right thing - reject the Bills.

We set out our reasons for making this call hereafter.

- b. In today's film and television production industries, digital distribution of content plays the central role to the existing and future economy of our sector. The introduction of new exclusive rights of copyright for digital distribution, making available and communication to the public is an important step to take to align with international law, and to ensure that our producers have equal statutory protections as their counterparts in other countries with thriving film production and distribution industries.
- c. The problem with the Bills is that it gives on the one hand, but takes away significant economic and transformative growth potential with the other hand. This leaves rights holders with new rights (that may not be enforceable), while at the same time severely limiting those same rights by prejudicing producers' ability to control and manage their rights. This lack of control and predictability disables producers from giving the necessary guarantees to secure financing for new productions.
- d. In this submission, we do not delve into the legal obstacles imposed by problematic provisions, but wish to *illustrate that the Bills are not fit for purpose, as they will directly and negatively impact government's own key imperatives for the development of our economy - key among this are Black Economic Empowerment and effective transformation of the sector, Youth empowerment and ensuring the future strength of our country is secured, Women empowerment and Social Cohesion. If businesses in this sector die, we inevitably cannot secure the work of performers and in turn any rights they fight for will become non-existent because productions simply will not take place further contributing to job loss statistics in our country. No production IP protection, equals, low investment, which equals less work or no work for ALL. We have made detailed submissions on this before³, to the National Assembly's Portfolio Committee on Trade & Industry, and we can expand further on this during the upcoming public hearings when we are hoping to be afforded an opportunity to engage directly with your Committee. In this submission, we summarize our key concerns at a high-level and provide more practical information on why the Bills are problematic for our industry. On this basis, our comments are set out below.*

Lack of Economic Impact Assessment

- e. 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. A legislative approach in respect of copyright laws that would serve to 'paint with a broad brush' across all creative industries, fails to appreciate the nuances and different market realities and established business practices and that the specificities of each sector needs to be taken into account when devising a legislative approach to as to avoid unintended consequences arising from legislative change. A legislative solution that may serve to address a problem in one industry (e.g., music), may have disastrous consequences if indiscriminately applied to another industry (e.g., film and television production). To safeguard against adverse spillovers, it is imperative that legislative frameworks preserve the necessary flexibility.

³ https://www.parliament.gov.za/storage/app/media/Links/2022/1-january/26-01-2022_Copyright_AB/IPO_ASA_Redacted.pdf

- f. 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. Even though some Members of Parliament also requested for the report to be made available to the National Assembly's Portfolio Committee during its most recent deliberations on the Bill, it was not made available for public consideration. While it constitutes a serious procedural omission in the legislative process, it also confirms that no comprehensive stakeholder engagement was done before the drafting of the Bill commenced, and that should have informed government's impact assessment study. We submit that this failure to properly consult with industry stakeholders in the lead-up to the drafting of the Bill, is the main reason behind the drafters' failure to appreciate that **'one-size-fits-all' legislative proposals are highly inappropriate** for an Act that governs so many different and commercially unrelated industries. Film and television production industries operate based on bespoke and completely different financing, creative work production, rights management and remuneration, and commercial models than other industries, say in the fields of book publishing, music, gaming, software development, and arts and crafts. A proper economic impact assessment would have revealed this during the development stage of the Bill, and its omission has resulted in major drafting flaws that cannot easily be fixed now, and that would require a substantial re-drafting effort.

Example: The Copyright Review Commission Report (2011) recommended that a copyright reversion provision be considered for musicians, who at the beginning of their careers when they are considered not to have much bargaining power, assign all their rights of copyright in their music to recording or publishing companies. Should their music be successfully commercialized, the rights reversion provision should provide them with an opportunity in the future to re-negotiate terms in certain circumstances, for instance, where they have not received fair and equitable remuneration for the commercialization of the copyright works concerned. The CRC Report recommended that this provision be modelled on the reversion right made provision for in the US Copyright Act. Section 107 of the US Copyright Act caters for a process through which a musician could obtain a rights reversion after 35-years, through a formalized procedure, and which excludes 'works made for hire' and 'derivative works' from its application. This means that the rights reversion would only be effective in respect of the original music and would not affect the rights of third parties who may have acquired the rights to include the music in other works, such as films and television productions. This is important to prevent the disruption of the continued commercialization of such works and avoid a scenario where every musician who licensed or composed music for use in films can, after a certain time, make claims against the film producer or studio to either pay more for the continued use of the music in the film, or otherwise stop commercializing the film altogether. A sophisticated approach is required when legislating for rights reversions. The proposal in the Copyright Amendment Bill is everything but that.

In a failed attempt to give effect to the recommendations of the CRC report, the reversion right was erroneously construed⁴ by the drafters of the Bill as an arbitrary 25-year limitation that is applied to the term of all assignments of copyright in literary and musical works.

⁴ Clause 25(b) of the Copyright Amendment Bill, purporting to amend Section 22(3) of the Act.

When read with Section 39B(1) of the Bill (the 'contract override provision'), this limitation cannot be contracted out of. This means that scriptwriters and music composers who write and compose for film and television, would not be able to agree to a full rights transfer for the life of copyright, regardless of whether they may wish to do so. This undermines a film producer's ability to consolidate all underlying rights in a production for the life of copyright, and in turn, means that films produced in South Africa could only be commercialized without risk of future rights losses and litigation for 25-years. **This constitutes a major disincentive to engage South African writers and composers for film productions in South Africa and serves as an example of a serious unintended consequence that results from an overly expansive and indiscriminate application of a legislative proposal meant for one industry, to all copyright industries.**

The same problem is perpetuated in the Performers' Protection Amendment Bill where a 25-year rights reversion of the new exclusive rights granted to performers in the Bill is proposed under Section 3A for performers featured in sound recordings. As audiovisual works such as film and television productions are composed of visual and sound recordings, this rights reversion would potentially also bear application in respect of audiovisual works, even though this was clearly not intended. Performers who made audible sounds on recordings included in film (including voice-over artists) could potentially claim these reversion rights after 25-years, rendering the continued commercialization of a film or television production beyond that point potentially highly problematic. The Copyright Review Commission report did not recommend that performers' rights in sound recordings be subjected to a reversion right and there appears to be no rationale supporting it. **Section 3A of the Performers' Protection Amendment Bill should be removed, or at the very least amended to exclude the application of the reversion right from derivative works, commissioned works, and audiovisual works that may contain sound recordings.**

It has been interesting to note, throughout the process of National Council of Provinces and Provincial hearings to date, that the opponents of these Bills are unanimous in the overarching concerns they raise about the Bills taken in their entirety - those many provisions which render the Bills fundamentally flawed and fraught with legal, constitutional and financial uncertainty and which will have a dire economic impact on the Creative Industries as a whole and, in turn on the country. Yet organisations representing proponents of the Bills seem to focus on one area of self-interest each without, it seems, giving any thought to the full text or the significant unintended economic consequences they will have if passed as is, even on those who are fighting for the adoption of the Bills.

Our key areas of concerns, and reasons therefore, are summarised:

Limitations on Contractual Freedom

- g. **Contractual flexibility** and the freedom of parties to film and television production contracts to enter into agreements in terms of their choosing, is an essential requirement for a thriving sector. There is no standardized contract or set of contractual undertakings that can apply across the board, as each production project requires a unique approach. Many different factors would ultimately determine the basis on which agreements can be concluded with the

parties concerned, including the size of the available budget, the nature of the production (i.e., different conditions and permutations apply whether a production relates to a feature film, television series, documentary feature, television commercial, music video, video game, etc.), the overall contribution made by each party to the production, etc.

- h. **In our industry, it is also critically important that a producer can consolidate all the underlying rights in a project.** During the development and pre-production phases, the producer would typically obtain rights clearances and transfers from all the different parties that would make creative contributions to the production, including scriptwriters, composers, actors, and other performers, etc. *Because a production cannot be sold piecemeal – for example, a script, soundtrack, special effects particular performance which individually have no value - it has to be sold as one, legally certain, entity. Hence, the producer must consolidate and hold all the rights in the production so that it can be marketed, sold, licensed, or distributed as ‘one package’ once production is completed.* This is important for the producer to be able to raise finance for the production, and for future commercialization purposes as it is the producer who must be able to guarantee that the end-product can be commercialized without the risk of future disputes arising that may hamper the continued commercialization of the work. It can take a long lead-time before any net-profits are yielded from commercialization activities and all costs and investments made into a production are recouped. If legislative restrictions are placed on a producer’s ability to consolidate all underlying rights (including copyright and performers’ rights) in a production, that would seriously jeopardize financing, insurance, and commercialization prospects, and could harm the commercial value of the content itself, if commercialization can only be guaranteed for a shorter period than the life of copyright.
- i. **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 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. It is based on the false assumption that all copyright contracts are patently expropriative and unfair in nature. Where contract overrides exist in foreign legislation, it caters for very bespoke and highly specific cases (and specific types of clauses in contracts). We 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. It will seriously prejudice South Africa’s creatives and film and television producers from concluding deals in terms of which creative materials can be included risk-free by producers in film and television productions for the life of copyright of those films. As mentioned in the Example provided above under para 2.4, this would constitute a major disincentive for producers to engage local writers and composers in film and television production projects. As explained in para 2.6 above, any restrictions placed on a producer’s ability to consolidate rights in a production for the life of copyright would severely prejudice the producer’s ability to raise the levels of finance required to produce high-value and quality works. 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. Regulatory interventions that may be made in terms of Section 39B would run the risk of introducing severe restrictions on the abilities of parties to conclude contracts on terms of their choosing in a free and open market environment that is predicated on contractual flexibility. Should government proceed to dictate what film and television production contracts should look like, or to impose prescriptive remuneration models for authors and performers featured in audiovisual works, this would seriously prejudice the ability of producers to attract new investments and projects to South Africa. New productions could simply be moved to other jurisdictions where similar restrictions on contractual freedom would not apply. **We submit that the new Sections 39(cG) and (cI) introduced by Clause 35 of the Bill should be rejected, noting that we submit elsewhere in these submissions that Sections 6A, 7A and 8A also be rejected.**

- The Bill contains a concerning proposal⁵ 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. We are not aware of any rational basis for this 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.**

Remuneration of authors and performers

- j. We are fully supportive of the principle that all creative contributors towards film and television productions be remunerated fairly and transparently, and that performers’ rights be adequately protected. However, please note, we believe that it is not the place of these Bills to resolve labour issues relating to the conflict of entitlements between an employee and an independent contractor. The introduction of new exclusive and moral rights for performers as proposed in the Performers’ Protection Amendment Bill (PPAB) is an important development that is aligned

⁵ Clause 3 of the Copyright Amendment Bill, purporting to amend Section 5 of the Act.

with international developments and the provisions of the Beijing Treaty on Audiovisual Performances. **The PPAB recognizes that performers should be entitled to receive either royalties or equitable remuneration** for the transfer of their rights under an agreement with a producer of an audiovisual work.⁶

- k. The Copyright Amendment Bill, however, seeks to introduce **new statutory royalty entitlements** for authors of literary works, musical works, visual artistic works and for performers whose performances are fixed in audiovisual works.⁷ Section 8A proposes an unwaivable statutory royalty entitlement for performers, meaning neither party may ever opt for any remuneration option other than one which includes even should the performer prefer a higher upfront payment, which differs from the approach adopted in the PPAB, as well as the requirements of the Beijing Treaty. The new royalty provisions were written into the Bill by the National Assembly's Portfolio Committee after the August 2017 Parliamentary hearings and were never fully opened for stakeholder consultation. It was also not subjected to an economic impact assessment or legal research that informs the basis on which these provisions were drafted and conceptualized. It appears that there was no legal research done to assess how the issue of authors and performers' remuneration is dealt with in other countries with comparable legal systems to that of South Africa, such as the United Kingdom or the European Union, where contractual flexibility is catered for in law. In the global film and television industry, statutory royalties are not the norm, in fact they are very much the exception, and flexibility is catered for to allow performers to be remunerated either through guaranteed lump-sum payments, royalty payments or a combination of both. How remuneration is structured will ultimately depend on a broad range of contributing factors, including the size of the production budget and nature of the production (whether a feature film, television series, animation work, documentary feature, music video, etc.) the overall level of the contribution made by the performer, and existing market practices and specificities.
- l. Section 6A – 8A of the Copyright Amendment Bill seeks to introduce a **statutory royalty regime** that is highly inconsistent when the Sections are compared with each other, and when the approach adopted in the PPAB is considered, which caters for contractual flexibility. Section 6A and 7A provides that authors of literary, musical, and visual artistic works will be entitled to receive a share of the gross profits made from the commercialization of the works. Section 8A determines that performers whose performances are fixed in audiovisual works shall be entitled to receive a share of the royalty that is received by the copyright owner for the commercialization of the work. Section 8A royalties would therefore not be calculated based on 'gross profits' and on the same basis as set out in Sections 6A – 7A, where 'royalty' is expressly defined to mean a share of gross profits. Section 8A was closely modelled on Section 9A, which relates to the Needletime royalty entitlement for performers featured in sound recordings (music industry). Needletime is essentially a license fee paid to the copyright owner by a music user such as a broadcaster every time recorded music is played and there is not already a license agreement in place with the owner of the sound recording concerned. In practice, these payments are made to collecting societies like SAMPRO who administer Needletime, from where payments are shared between copyright owners and performers. The same structure cannot be made applicable to the film and television industries as film productions are not used and licensed for use in the same way as recorded music is. It is unclear

⁶ Section 3A of the Performers' Protection Amendment Bill.

⁷ Sections 6A – 8A of the Copyright Amendment Bill.

who will be making the royalty payments under Section 8A to copyright owners. What is clear is that if there are no royalties payable by third parties to copyright owners, there would be no royalty to share with performers under Section 8A. Online streaming platforms that produce their own original content and make it available to subscribers of their online distribution services do not, for instance, receive royalty payments. The same can be said for copyright owners who release films through cinemas and theatres and owners of television commercials that are flighted on television for marketing purposes. **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.** Clearly, a lot more legal research, stakeholder consultation and economic impact assessment is required to determine exactly in which creative industries a legislative intervention may be required to address an identified problem with how authors and performers are currently being remunerated, and then to develop a bespoke solution to address that specific issue.

- m. **Requirement to register and report each act of commercialisation:** Another key problem with the Section 8A royalty entitlement for performers is the obligation on copyright owners and their licensees, and any other users of audiovisual works, **to register each act of commercialization** and provide a *‘complete, true, and accurate report’* to each performer concerned. Section 8A must be read with the PPAB, which contains a broad and unspecific definition of ‘performer’, which would include so-called ‘extras’ or background performers. If Section 8A were to extend the royalty entitlement to all performers as is currently envisaged, including ‘extras’, it would result in an unmanageable situation where each act of commercialization of a film (including for instance every time a particular film is streamed to a user of an online service, which can amount to millions of reportable actions in a single day) should be reported to each and every performer, regardless of the level of contribution made to the overall production (there is no distinction being made between main or featured actors and extras). The Section 8A royalty entitlement would also apply to the benefit of extras. Considering that feature films can include participation of hundreds of actors, or even thousands when scripted crowd scenes are filmed, this goes to show how problematic the practical implementation of the Section 8A royalty entitlement would be. To compound the issue, it is proposed in Section 8A(6) that the non-compliance with the new mandatory reporting obligation would **introduce criminal liability and sanctions of imprisonment or fines of a minimum of 10% of the offending company’s turn-over.** It is difficult to comprehend why a copyright owner or a licensed user who makes legitimate use of an audiovisual work would be subjectable to such disproportionate penalties, that would place them at more risk than most copyright infringers and content pirates. We understand that the criminalization of non-reporting on music uses was motivated in the past by stakeholders in the music industry, due to specific challenges encountered in respect of large-scale music users (including some local broadcasters, like the SABC) failure to report on music usages made to collecting societies. The same problem does not exist in the film and television industries, and just as Needletime-styled royalty entitlements are inappropriate for application in our industry in the same way as it exists in the music industry, the criminalization of non-reporting on commercial usages made by large-scale users of recorded music, should also not spill over into the audiovisual industry where there is no similar problem to address.

- n. It is our submission that the new statutory royalty entitlements introduced under Sections 6A – 8A of the Copyright Amendment Bill, and the mandatory reporting function introduced under Section 8A, coupled with criminalization of non-compliance, would not achieve the intended outcome of improving the financial position of our authors and performers. It would more likely have the opposite effect of discouraging new investments for productions in our sector, due to the heightened level of legal risk that it would introduce for copyright owners, producers and investors, resulting in less work for all in the sector. **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.**

Enforcement

- o. The Copyright Amendment Bill takes a step in the right direction through the introduction of the new, so-called ‘digital rights’, namely the exclusive rights of distribution, making available and communication to the public in the online environment. This is aligned with the approach and requirements of WIPO’s ‘Internet Treaties’, namely the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), which extends legal protections of authors and copyright owners to their works in the digital space. South Africa has not yet acceded to these treaties, but government has already resolved to do so, and accession is anticipated to be finalized after the enactment of the Bills.
- p. The WIPO internet treaties also require “adequate legal protection and effective remedies” to be legislated for in respect of Technological Protection Measures (TPMs). TPMs are vital tools for copyright owners to prevent unauthorized access and use made of their works in the online environment. This enables creators and rights holders to offer consumers their content for accessing online at a place, time and manner of their choosing, and to explore new business models and opportunities that are opened up by current and emerging technologies. Unfortunately, the Copyright Amendment Bill’s provisions relating to TPMs are inadequate, and this undermines the central role that digital distribution of content currently plays in our sector. The provisions need to be reconceptualized and re-drafted to align with the WIPO treaties.
- q. 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 our 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 manoeuvre than they currently have to make unlicensed and unremunerated consumptive 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.
- r. **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.

- s. 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.
- t. **Don't believe the myths being advanced by the pro-Bills lobby:**
- *"The bills are controversial"*: Almost the entire business end of affected industries is united in opposing the bills because they are flawed and will reduce work for all.
 - *"These Bills will take South Africa into the 21st Century"*: They will not! They will take the entire value chain of all the creative industries into a very bleak future in which South Africa will be the laggard in the global creative economy.
 - *"These Bills are pro-poor"*. They are not! The poor will get poorer as there will be less work for all.
 - *"The anti-Bills lobby represents foreign interests and big business"*. The anti-Bills lobby represents thousands of small businesses, mostly black, and large businesses all trying to create work for all in the creative industries and satellite economies (it could be argued that foreign interests and big business best describes those behind the pro-Bills lobby, those megalithic companies which stand to gain/earn the most from these bills being passed).
 - *"Fair Use exists elsewhere in the world"*: But NOT as contained in these Bills! This provision is a hybrid mess which will open the door to wholesale, and undefendable, copyright infringements.
 - *"Actors will be better off by getting a share of profits"*: They won't. They'll get lower upfront payments with no guarantees of future royalties as most productions don't make a profit, and there will be less work for them under these Bills. **Royalties on nothing = nothing.**
 - *"Extras are explicitly excluded from consideration as performers in the Beijing Treaty"*: false. Both the PPA, PPAB and Beijing Treaty use the same broad definition, which would definitely include "extras".
 - *"The flaws can be fixed with Regulations"*: They can't. The Bills will be Law. Regulations are standards and rules adopted to govern how the laws will be enforced. They cannot change the fundamental, and in this case seriously flawed, provisions in the laws.
 - *"These Bills are internationally aligned"*: They are not. They do not pass the three-step test, they contain provisions that will render South Africa a global outlier. This will be a serious deterrent to working in or with South Africa.

6. Conclusion

- a. During the legislative process to date, producers' concerns have unfortunately, and inexplicably been largely ignored. Our written submissions and presentations made to the National Assembly's Portfolio Committee were not properly interrogated or responded to. As our submission shows, the enactment of the Bills would severely disrupt our sector and undermine producers' ability to attract new investments required to facilitate high quality and value audiovisual productions and deter international studios and streamers from bring productions

– worth billions of rand and creating thousands of jobs – to South Africa, It would also restrain producers from being able to consolidate rights in productions for the life of copyright in a work, which would harm the value of content produced in South Africa and defer investments and divert it to other jurisdictions where similar invasive restrictions on contractual freedom do not exist in law. **We submit that our industry remains uniquely positioned to become a key driver of post-pandemic economic recovery and growth, but this can only happen if the underlying legislative framework is conducive for significant inflow of new investments.** The Bills were not drafted with an economic focus. It was drafted with a mindset that the weakening of copyright protections is in the public interest, while not appreciating that strong copyright protections are in the public interest. It is what incentivizes the creation of new works of quality that the public is inspired by and like to enjoy. Without this incentive to create and produce and invest in new productions, none of the stated policy objectives of the Bills would be fully realized, and ultimately it would be the very people that government seeks to uplift through this process, our creatives, and producers of content, who would suffer the most prejudice.

- b. Importantly, **the film economy relies on, contributes to and supports the informal sectors’, SMME and EME development and growth.** Many local film companies also fall into these categories, with the majority of the workforce being from previously disadvantaged communities (Blacks, youth and women). The Bill will negatively impact progress that has been made towards greater participation in the industry of these groups including for youth and women in leadership in the industry, while also constraining industry’s ability to tell and export our stories of the country and its indigenous cultures. The Bills are not fit for purpose and will not advance the country in a way that is meaningful or as intended. Instead, because IP protection is not guaranteed, future production and sales of creative works will be reduced, increasing job losses and diminishing induced impacts and the entire value chain including performers, small businesses and other support services will cease to have work.

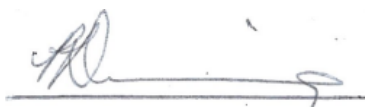
We submit that the Bills are so materially flawed that they should be rejected by the Province and the NCOP and returned to Parliament for urgent further work to be commenced with to re-conceptualize and re-draft the Bills. The opportunity exists in this legislative reform project to position South Africa as a preferred global destination for high quality and investment value audiovisual productions to be based in. As the Bills are currently tabled, it would achieve the opposite outcome; cause irreparable harm to our film and television production industries, and result in major disinvestment. Opportunities to ignite the industry and enable it to drive job creation, transformation, and economic growth in South Africa would unnecessarily be lost. It is essential that any re-drafting process that may be initiated in respect of the Bills, be informed by appropriate economic impact assessments, and attended to under the guidance of renowned industry experts, and copyright lawyers who are recognized for being highly skilled and experienced in the practice of copyright law.

Professor Owen Dean, Professor and Chair of Intellectual Property Law at Stellenbosch University, says “Parliament has a duty to ensure that it doesn’t pass laws that are knowingly defective”. From the multiple submissions to Parliament, the NCOP and the Provinces which highlight the many obvious defects in these Bills, passing them as is would be a serious breach of this duty.

We look forward to the opportunity to engage further on these issues and hope to participate in a new process that will ensure the development of a sound, internationally aligned and globally competitive copyright regime that will become a springboard from which South Africa will be enabled to optimise its magnificent potential to become a significant player in and contributor to the global creative economy.

We thank you for considering this submission.

Yours sincerely



For the IPO

Full Name: Trish Downing



For the IBFC

Full Name: Azania Muendane



For the ASA

Full Name: Nick Cloete

