



MOTION PICTURE ASSOCIATION EMEA

Brussels, 27 January 2023

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

By email to the Select Committee Secretariat:
ndinizulu@parliament.gov.za; mkoff@parliament.gov.za.

Dear Honourable Chair,

Re: Comments of the Motion Picture Association (MPA EMEA) on the Copyright Amendment Bill No. B13D of 2017 and Performers' Protection Amendment Bill No. B24D of 2016

The Motion Picture Association (MPA) represents the interests of major international producers and distributors of film and television content. Our members are Netflix Studios, Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

First of all, we would like to thank you for providing stakeholders with the opportunity to express their views in the context of the public consultation on the Performers Protection Amendment Bill [B 24D – 2016] and the Copyright Amendment Bill [B 13D – 2017]. We welcome the opportunity to participate in this consultation and would also like to express our interest in engaging with you through a verbal presentation to the Committee during the upcoming public hearings.

Developing a modern regulatory framework is of paramount importance to enhance the competitiveness of the South African audiovisual sector. This would promote more productions, as well as local and international investment in South African content, to offer South African stories both locally and to the rest of the world.

The importance of investment from the audiovisual sector

In recent years, due to an unprecedented growth of consumer demand for high quality audiovisual and entertainment content, the global production environment has become intensely

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competitive. Investments made into high quality film and television production can have a very positive impact on local economies. Film and television industries can become key drivers of economic growth, job creation, employment, tourism, and the preservation and international promotion of cultural and national identity. Economic impact assessments that tracked film and television productions have illustrated how investments made into high quality productions can inject capital swiftly into local economies where productions are located and have a major positive knock-on effect on a multitude of satellite economies that support the facilitation of productions¹.

An estimated 67% of production costs is spent in other business sectors outside of screen production, including hospitality, catering, construction, engineering, travel, etc². South Africa's film and television industries have tremendous potential to attract new productions and investments and the underlying copyright and performers' rights legislative frameworks play an important role towards positioning South Africa as a preferred global destination for high quality audiovisual productions.

High quality film and television productions are extremely high financial risk ventures. Many productions do not yield a net profit. Production companies leverage their losses against the comparatively small percentage of films that are commercial successes. Film producers assume all of the financial risk, raising the required levels of finance to facilitate the development, production, marketing and distribution of new films. Thus, producers will be much less inclined to make these significant investments if South African law subsequently dilutes their rights in the finished product. Not diluting their rights is important to reduce or avoid the risk of future disputes arising on those rights, and to guarantee the undisturbed commercial exploitation of a work for the benefit of all creative contributors. Failure to guarantee this would harm the value of the content, and prejudice the ability of the producer to secure the levels of funding required to produce high quality motion pictures and television series in the first place.

The proposed Bills are highly problematic

The Bills contain a number of concerning proposals that would introduce legal uncertainty on key issues, and severe limitations on contractual freedoms. However, legal certainty and contractual freedoms are fundamental for producers to raise finance, accurately budget for new productions, and consolidate rights in an audiovisual project. Every project requires contractual flexibility to cater to different production, distribution, remuneration, and commercialization models, whether the work produced is a feature film, television series, documentary feature, animation

¹ [The Impact of Film and Television Production on Economic Recovery from COVID-19 — Olsberg SPI \(olsbergspi.com\)](https://www.olsbergspi.com/)

² See [study](#) mentioned above: page 2, Key Findings: “detailed analysis of production budgets and cost reports shows that Screen Productions inject huge amounts of capital very rapidly into an economy. Analysis of a major film shows that an average of \$10 million per week was spent during a 16-week shoot. This spend positively impacts other sectors to a significant degree. On average, 67% of production costs are spent in other business sectors outside of Screen Production”; and page 8, Table 1 detailing the proportion of production spend in other business sectors by project type.

work, etc. Accordingly, provisions³ that serve to restrict contractual freedoms in the film production sector would position South Africa negatively when compared with production environments in other countries without similar restrictions.

In addition, the Copyright Amendment Bill was not supported by an economic impact assessment study and fails to appreciate the specificities of the film and television production industries. For example, it includes provisions initially developed for the music industry⁴.

As a result, there are many provisions in the Bills that propose dramatic changes for the way in which film and television productions can be facilitated and commercialized in South Africa, none of which were properly assessed by means of economic impact assessment or demonstrable research of international best practices. The implementation of these legislative proposals will unnecessarily heighten the risk for new investments into high quality productions in South Africa. Rather than enhance the interests of authors and performers, it would be detrimental to their livelihoods by threatening the steady flow of investment necessary to sustain the industry.

Another concern is the Bills' failure to introduce meaningful enforcement mechanisms and remedies to assist rightsholders in combatting the scourge of online infringement and piracy. For example, the provisions relating to Technological Protection Measures (TPMs) are inadequate to provide for effective legal protections for works made available in the online environment, where most content distribution takes place nowadays. Similarly, overly broad exceptions and limitations to exclusive rights of copyright would further reduce the ability of rightsholders to take effective action against infringers.

Consequently, it would be more prudent for the honorable Members of the Select Committee 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.

For instance, preserving contractual flexibility, as well as recognizing the sectors' specificity and market practices regarding contractual provisions would help rightsholders to recoup investment in development, production, marketing and distribution, to finance new films and TV content and

³ Examples include the 25-year reversion right proposed for authors of literary and musical works (Section 22(3) of the CAB); the reporting obligations (new Section 9A(aA) of the CAB and new Section 5(1A) of the Performers' Protection Act) which impose heavy financial and administrative burdens, for example by obliging the user to register the act in advance and by including all performers, including extras, in the scope of the mandatory obligation in the case of the Performers' Protection Act; New Sections 39 (cG) of the CAB and new Section 8D of the Performers' Protection Act which expand the scope of the Minister's regulatory powers to prescribe compulsory and standard contractual terms to be included in agreements.

⁴ E.g., a Needletime-styled royalty entitlement for performers featured in audiovisual works (Section 8A of the CAB that was closely modelled on the Needletime provisions for the music industry in Section 9A); and the criminalization of the non-reporting on all commercial uses made of audiovisual works in new Section 8A(6) and other new Sections introduced by the CAB which contain the same sanction (criminalization was originally recommended in the 2011 Copyright Review Commission Report only for the music industry to address identified problems relating to the reporting on music usages by broadcasters and other large users of recorded music to royalty collecting societies).

ensure appropriate and efficient distribution to the market place. This would ultimately benefit South African creators more effectively and thereby achieve the intended goal of the currently contemplated legislative reform. The MPA supports the broader goals of updating the regulatory framework in a manner that supports the interests of creators. However, the specific mechanisms which the Bills have chosen to achieve greater protection for the interests of authors and performers will damage the overall health and growth of the sector.

The MPA encourages the honorable Members of the Select Committee 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 MPA remains at your disposal and looks forward to engaging constructively with your Committee and to elaborating further on the expressed concerns during the public hearing process.

Thank you very much for your kind consideration and for your continued collaborative approach.

Yours sincerely,



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