

24 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.

and

To whom it may concern in the Provincial Legislatures

Dear Honourable Chair

**Submissions on the Copyright Amendment Bill No. B13D of 2017 and the Performers Protection
Amendment Bill No. B24D of 2016 by the South African Institute of Intellectual Property Law (SAIPL)**

The South African Institute of Intellectual Property Law (SAIPL) was established in 1954. Its members comprise approximately 200 lawyers and practitioners of copyright, patent, design and trade mark law who are experienced in the protection of intellectual property rights.

SAIPL has participated in calls for comments on the Copyright Amendment Bill and the Performers' Protection Amendment Bill since 2015, when the Draft Bill was published by the DTIC, and from 2017 to 2022 when both Bills were being processed in Parliament.

SAIPL agrees that both the Copyright Act and the Performers' Protection Act need to be updated and that changes are long overdue. The report of the Copyright Review Commission that recommended certain changes was issued more than ten years ago, and nearly four years have passed since Parliament resolved that South Africa should accede to the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Beijing Treaty on Audiovisual Performances.

This submission comments on sets of provisions in the Copyright Amendment Bill and the Performers' Protection Amendment Bill by subject. It also identifies subjects that have not been covered by the Copyright Amendment Bill.

Our submission is comprehensive and lengthy. To facilitate easy access to the many subjects covered by this submission, SAIPL has couched each subject in a self-contained chapter and set out its recommendations for each subject in an executive summary.

SAIPL's submission is online at <https://saiipl.co.za/wp-content/uploads/2023/01/SAIPL-submission-Copyright-And-Performers-Protection-Amendment-Bill-January-2023.pdf>.

Unlike earlier submissions, this submission does not raise our concerns about procedural omissions relating to the Bills as a self-standing topic. These concerns include the National Assembly's accepting the Bills without a proper impact assessment under Government's own internal rules, the history of short and inadequate notice periods for comment, limitations placed on the scope for comments, and its reliance on the advice of a single group of stakeholders to support the Bills. Our position in relation to these concerns remains unchanged.

The more serious flaws in the Copyright Amendment Bill go to its very core, as summarised below, and we believe that this will harm the local authors and artists that the Bill was intended to protect:

- the extrapolating of new rights and exceptions that apply to one class of works across all works in an arbitrary "one-size-fits-all" approach;
- the statutory royalty entitlements of authors and performers that are erroneously based on the 'needletime' entitlements of copyright owners of sound-recordings and the performers who feature in them;
- the mis-cast reversion of rights to certain authors and performers after 25 years;
- the expansive and dispossessive copyright exceptions;
- the provisions to protect technological protection measures that do not meet the requirements of international treaties;
- the blanket contract override clause and Ministerial powers to lay down compulsory contract terms that arbitrarily limit the freedom to contract.

The deficiencies in the copyright exceptions and the protection of technological protection measures could well be challenged for their constitutionality if Parliament passes the Bills. A constitutional challenge will result in further significant delays, in addition to the six years that have already passed since the Bills were introduced to Parliament.

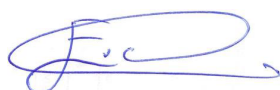
The Bills' provisions referred to above, and others, must be reconceptualised and redrafted. Such an enormous task cannot be expected from the National Council of Provinces and each of the Provincial Legislatures, or Parliament's Mediation Committee relying on stakeholder comments, much less so within the 30-day timeframe afforded by the Constitution.

Saiipl can come to no other recommendation that the Provincial Legislatures and the National Council of Provinces must reject the Bills and that Parliament should allow the Bills to lapse in terms of section 76(1)(a) and (d) of the Constitution.

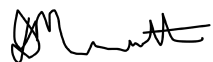
We would like to participate in the upcoming public hearings, including the Select Committee's hearings scheduled for the end of February and early March 2023. Our submission was compiled by a task team of attorneys and advocates who practise in the specialist copyright field of law, and we are prepared and willing to assist with the understanding of legal topics raised by the Bills.

Yours faithfully

SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW



ÉRIK VAN DER VYVER
President



DEBBIE MARRIOTT
Convenor: Copyright Committee

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